Awrey Bakeries, Incorporated *and* Council 30, United Distributive Workers Union, Retail, Wholesale and Department Store Union, AFL–CIO *and* Douglas Wiseman. Cases 7–CA–43042 (2) and 7–CB–12585 (2)

August 24, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On May 11, 2001, Administrative Law Judge Jane Vandeventer issued the attached decision. The Respondent Employer filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent Employer filed a reply brief. The General Counsel also filed cross-exceptions with a supporting brief, and the Respondent Employer filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Employer, Awrey Bakeries, Incorporated, Livonia, Michigan, its officers, agents, successors and assigns; and the Respondent Union, Council 30, United Distributive Workers Union, Retail, Wholesale and Department Store Union, AFL–CIO, Warren, Michigan, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Rescind and cease giving effect to the following provision in the collective-bargaining agreement:

> The Union agrees that its members shall not carry on any Union activities on Company time during working hours. . . ."

2. Substitute the following for the new paragraph 2(b).

"(b) Within 14 days after service by the Region, post at Respondent Employer's Livonia, Michigan, location and Respondent Union's Warren, Michigan location, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent Employer has gone out of business or closed the facility involved in these proceedings, the Respondent Employer shall duplicate and mail, at its own expense, a copy of the notices to all current employees and former employees employed by the Respondent at any time since March 1, 2000."

Dated, Washington, D.C. August 24, 2001

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Judy A. Schulz, Esq., for the General Counsel.
Russell S. Linden, Esq. (Honigman, Miller, Schwartz and Cohn), for the Respondent Employer.
George M. Maurer Jr., Esq. (Maurer & Kalls), for the Respondent Union.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on February 5, 2001, in Detroit, Michigan. The complaint alleges Respondent Employer violated Section 8(a)(1) and (5) of the Act by attempting to prevent an employee from attending a meeting between Respondent Employer and Respondent Union, and violated Section 8(a)(1) by threatening him with discipline if he attended the meeting. The complaint

[1] There were no exceptions to the judge's finding that the Respondent Union violated Sec. 8(b)(1)(A) of the Act or to the recommended dismissal of the 8(a)(5) unfair labor practice allegation.

[2] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

also alleges Respondent Employer and Respondent Union violated Section 8(a)(1) and 8(b)(1)(A) respectively by maintaining a clause in the collective-bargaining agreement which limits union activity in the workplace. Both Respondents filed answers denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs which I have read.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Michigan corporation with an office and place of business in Livonia, Michigan, where it is engaged in the manufacture and sale of baked goods. During a representative 1-year period, Respondent purchased and received at its Livonia facility goods valued in excess of $50,000 directly from points outside the State of Michigan. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

There are two aspects to this case. One is a contract provision which the two Respondents have maintained in their collective-bargaining agreement for many years. The second is a single incident involving a union committeeman and his supervisor which took place on August 28, 2000.

The facts regarding the contract provision are simple and undisputed. For many years—the parties estimate it is more than 30 years—Respondent Employer and Respondent Union have had a provision in the collective-bargaining agreement which reads as follows:

> The Company agrees not to discriminate directly or indirectly against any employee or employees on account of service on the aforesaid Top Committee or for any other Union activity, or for communicating any grievance to the Union or its duly authorized representatives. *The Union agrees that its members shall not carry on any Union activities on Company property during working hours*, except that members of the Top Committee may conduct the official business of their office during working hours. [Emphasis added.]

This provision occurs as the concluding paragraph of the section dealing with the procedure for filing of grievances. The Top Committee referred to is a five-member committee of employees elected by the Union's membership as their governing body. The emphasized portion of the provision above is the portion which the General Counsel alleges is overbroad and violates Section 8(a)(1) and 8(b)(1)(A) of the Act.

With respect to the incident on August 28, 2000,[1] there is very little factual dispute regarding it. Douglas Wiseman has been one of the five elected members of the "Top Committee," the union's governing body, and was the only one of the Top Committee who worked on the night shift. He testified that his normal duties as a committeeman were to meet with management, to enforce the contract, and to participate in negotiations. He also testified that he was sometimes called upon to deal with grievances during the night shift if there were no steward present at the time.

Wiseman's immediate supervisor was Mark Foukes, who worked on the day shift, and whose presence in the plant overlapped with Wiseman's for only an hour or two each day. According to Wiseman's testimony, Foukes had stated to Wiseman in late July or early August that he was to perform his union duties only on breaks and lunch. On the morning of August 28, Wiseman learned of a hastily-called meeting between the Top Committee and management concerning the assignment of a bargaining unit employee to work in the retail baked goods store, which was not a part of the bargaining unit. Wiseman began to go to the second floor of the plant in order to attend the meeting, when Foukes confronted him and told him that he did not want Wiseman to go to the meeting, and that he would be disciplined if he did so. Fouked denied the threat to discipline Wiseman, but admitted that he had insisted that Wiseman go back to work. Foukes' memory of the incident was not particularly clear. Wiseman appeared to be a careful and conscientious witness and I credit him.

Wiseman attended the meeting with management and the other Top Committee members. After the meeting, which lasted a couple of hours, Wiseman spoke alone with Glen Korzyn, Respondent Employer's director of human resources, about Foukes' attempt to prevent him from attending the meeting and threat of discipline. Korzyn told Wiseman that he would talk to Foukes and straighten it out. Korzyn testified that he did meet with Foukes after this and set him straight concerning the committee's necessary union activities. Wiseman did not receive any discipline because he had attended the meeting, and has had no further problems with Foukes concerning his union duties since this meeting with Korzyn.

B. Discussion and Analysis

With respect to the contractual language, Respondents argue that because the language has been in the collective-bargaining agreement for so many years, has never, to their knowledge, been used to stifle employees' Section 7 rights, and is properly read in the context of the grievance procedure only, that it is not unlawful. The Respondents argue that the "extrinsic evidence" of past practice be considered in "interpreting" the provision as a lawful one. The General Counsel argues that the language is patently unlawful under *The Magnavox Co. of Tennessee*, 415 U.S. 322 (1974), where the Supreme Court found unlawful an equally hoary and ancient agreed practice limiting employees' rights to distribute literature on the plant premises. The Supreme Court, while noting that a union may waive certain employee rights, i.e., the right to strike, in exchange for a griev-

[1] All dates hereafter are in 2000, unless otherwise specified.

ance and arbitration procedure, it may not waive the rights of employees "to exercise their choice of a bargaining representative . . .—whether to have no bargaining representative, or to retain the present one, or to obtain a new one . . . The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute Section 7 rights." 415 U.S. at 325. The Board has continued to apply this doctrine to the relatively few cases which arise under it. See, e.g., *Belle of Sioux City*, 333 NLRB No. 13, slip op. at 4 (2001); *The Mead Corp.*, 331 NLRB No. 66, slip op. at 2 (2000); *Summa Health System*, 330 NLRB No. 197, slip op. at 23 (2000).

While in this case there was, with the exception of the August 28 incident described above, neither enforcement of the provision nor any apparent intention to enforce it against employees, the very fact that it is in the collective-bargaining agreement for every employee to read would tend to dissuade employees from freely engaging in protected conduct at work. In the familiar phrase, it "chills" employees' exercise of their Section 7 rights. *Laidlaw Transit*, 315 NLRB 79 (1994). In fact, the misapprehension under which Foukes suffered could well have had its origin in a reading of the defective language contained in the contract. For these reasons I reject Respondents' argument that the contract language was, in practice, read as "working time," not "working hours," I find that Respondent Employer has violated Section 8(a)(1) of the Act by the maintenance of this provision in the collective-bargaining agreement.

With respect to the violation alleged against Respondent Union, however, the General Counsel was unable to cite any cases precisely on point. While it is certainly true that unions have been held accountable under Section 8(b)(1)(A) for similar restrictions imposed upon employees' Section 7 rights, such as restrictions on employees' rights to engage in intraunion campaigning, dissent, or other criticism of the union or its current leadership, neither *Magnavox* nor any of the recent cases citing it involve a charge against a union.

The General Counsel argues that "by agreeing to the above described language, the Union has not only unlawfully limited its own members [rights] to engage in pro-union activity, but has [also] limited the ability of its members to engage in dissident union activity." The General Counsel cites *Letter Carriers (Postal Service)*, 316 NLRB 1294 (1995) in support of its arguments. The Board, in that case, found that a union violated Section 8(b)(1)(A) by entering into a grievance settlement which prevented employees from distributing literature critical of the union's leadership. This case is analogous to the situation in the instant case. It is also logically appealing to conclude that if an employer is to be held accountable for the collective-bargaining agreement provision, a union who is equally a party to the provision should also be held accountable in the same way. I therefore find that Respondent Union has violated Section 8(b)(1)(A) by agreeing to and maintaining in the collective-bargaining agreement the portion of the provision which restricts employees' rights to "carry on union activities on company property during working hours."

Turning to the incident of August 28, I have found that, indeed, a first-line supervisor did attempt to prevent Wiseman from attending a union meeting with management which was undisputedly part of his role as a Top Committeeman, and did threaten him with discipline. However, it is apparent that Foukes was under a mistaken viewpoint as to what Wiseman could do by way of union activities during the workday. It is equally apparent that after Korzyn educated him on the issue, he stopped attempting to limit Wiseman's union activities. Wiseman, who knew better than Foukes what his rights to engage in union activities were, attended the meeting without any further interference, and without suffering any discipline. Korzyn took action promptly, corrected Foukes' erroneous views and behavior, and Wiseman has had no further problems with Foukes attempting to limit his union activities.

The threat of discipline affected only one Top Committee member, and hung over Wiseman for only a couple of hours, while he was attending the meeting, before he could bring it to the attention of the director of human resources. Especially in the context of a long and apparently good bargaining relationship, it would be illogical and inequitable to find that this momentary misunderstanding, promptly ameliorated, constituted a refusal to bargain. Under all the circumstances, I am unwilling to find that Respondent violated the law merely because one of its supervisors was imperfectly schooled in the collective-bargaining agreement and had to be corrected by a higher level manager, which was done as soon as Korzyn was told about the problem. I dismiss the portion of the complaint which alleges that Respondent Employer violated Section 8(a)(1) of the Act by Foukes' threat of discipline and Section 8(a)(5) by his fruitless attempt to prevent Wiseman's attendance at the meeting on August 28.

CONCLUSIONS OF LAW

1. By maintaining a restrictive contractual provision limiting employees' rights to engage in Section 7 activities, Respondent Employer has violated Section 8(a)(1) of the Act.

2. By maintaining a restrictive contractual provision limiting employees' rights to engage in Section 7 activities, Respondent Union has violated Section 8(b)(1)(A) of the Act.

3. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

4. The complaint paragraphs alleging violations of Section 8(a)(1) and (5) by Respondent Employer based on the incident of August 28 are dismissed.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The Respondent Employer, Awrey Bakeries, Incorporated, Livonia, Michigan, and Respondent Union, Council 30, United Distributive Workers Union, Retail, Wholesale and Department Store Union, AFL–CIO, Warren, Michigan, their respective officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or giving effect to the provision in their collective bargaining agreement which reads "The Union agrees that its members shall not carry on any Union activities on Company property during working hours."

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at Respondent Employer's Livonia, Michigan, location and Respondent Union's Warren, Michigan location, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent Employer has gone out of business or closed the facility involved in these proceedings, the Respondent Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2000.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. May 11, 2001

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain a provision in the collective bargaining agreement which prohibits employees from engaging in union activities on company property during working hours.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL rescind and cease giving effect to the following provision in the collective bargaining agreement:

> The Union agrees that its members shall not carry on any Union activities on Company property during working hours . . .

AWREY BAKERIES, INCORPORATED

COUNCIL 30, UNITED DISTRIBUTIVE WORKERS UNION, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL–CIO

Board and all objections to them shall be deemed waived for all purposes.